

1 UNITED STATES DISTRICT COURT
23 DISTRICT OF NEVADA
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78 JOHN TURNER,
910 Plaintiff,
vs.
11 LAS VEGAS METROPOLITAN POLICE
12 DEPARTMENT, *et al.*,
13 Defendants.
1415 2:16-cv-02413-RFB-VCF
16
REPORT AND RECOMMENDATION
17 SEVENTH AMENDED COMPLAINT SCREENING [ECF
18 NO. 104]
1920 Before the Court is Plaintiff John Turner's Seventh Amended Complaint. (ECF No. 104). For the
21 reasons discussed below, (1) Defendants I. Fouquet, "D," the State of Nevada, Bonner, M. Gove, and P.
22 Hernandez should be dismissed from the case with prejudice; (2) Counts 4 and 9 should be dismissed with
23 prejudice; and (3) the First Amended Complaint should be allowed to proceed on Counts 1, 2 (as to G.
24 Hoder and Diaz), 3, 5, 6, 7, and 8.25
BACKGROUND

On October 14, 2016, Plaintiff filed an application to proceed *in forma pauperis* and complaint, generally alleging that his rights were violated during and after his arrest. (ECF Nos. 1, 1-2). The Court granted the application to proceed *in forma pauperis*, but recommended that the complaint be dismissed with leave to amend. (ECF No. 2). Plaintiff previously filed six amended complaints, and none to date have survived the Court's screening process. (ECF Nos. 14, 20, 40, 62, 90, 96).

ANALYSIS

When the Court grants an application to proceed *in forma pauperis*, the Court must review the complaint to determine whether the complaint is frivolous, malicious, or fails to state a plausible claim.

1 28 U.S.C. § 1915(e)(2)(B). Federal Rule of Civil Procedure 8(a) provides that a complaint “that states a
 2 claim for relief must contain...a short and plain statement of the claim showing that the pleader is entitled
 3 to relief.” If the Court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend
 4 the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint
 5 that the deficiencies could not be cured by amendment. *Cato v. United States*, 70 F.3d 1103, 1106 (9th
 6 Cir. 1995).

7 Before screening the complaint pursuant to § 1915(e), the Court notes that the complaint is difficult
 8 to read due to both the handwriting and the use of abbreviations and terms that Plaintiff does not explain.
 9 The Court has interpreted the complaint to the best of its abilities.

10 **I. Defendants**

11 Plaintiff names 23 Defendants in the Seventh Amended complaint. (ECF No. 104 at 2-8).
 12 Defendants I. Fouquet (*Id.* at 2) and “D” (*Id.* at 3) have no allegations against them in the rest of the
 13 complaint. In addition, Plaintiff lists the State of Nevada as a Defendant. (*Id.* at 8). “[C]ourts must
 14 dismiss section 1983 claims brought against ‘[s]tates and governmental entities that are considered ‘arms
 15 of the State’ for Eleventh Amendment purposes.’” *Selander v. Eighth Judicial Dist. Court*, No. 3:18-cv-
 16 00092-MMD-CBC, 2018 WL 6929256, at *2 (D. Nev. Oct. 31, 2018), *report and recommendation*
 17 *adopted*, No. 3:18-cv-00092-MMD-CBC, 2019 WL 95775 (D. Nev. Jan. 3, 2019) (quoting *Will v.*
 18 *Michigan Dep’t of State Police*, 491 U.S. 58, 70, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989)).
 19 Therefore, Defendants Fouquet, “D,” and the State of Nevada should be dismissed from the case with
 20 prejudice.

21 The Court acknowledges that many, if not all, of the Defendants may be able to argue that they are
 22 immune from suit for various reasons. However, due to the large number of Defendants and various
 23 immunities they may raise, the Court will not address immunity at this juncture and will leave it to the
 24 Defendants to argue this matter when they enter the case.

1 **II. Plaintiff's Counts**

2 Plaintiff brings nine Counts in the Seventh Amended complaint. (ECF No. 104 at 9-33). The
 3 Court notes that the Counts are presented out of order, and Plaintiff's request for relief is mixed into the
 4 middle of the complaint (*Id.* at 29) rather than presented at the end. However, considering that this is
 5 Plaintiff's Seventh Amended complaint, it would not be efficient to have Plaintiff re-file the complaint to
 6 fix these errors.

7 Count 1 is brought against Defendants Las Vegas Metropolitan Police Department,¹ Daniel
 8 Woodard, A. Goodrich, and J. Winn. (*Id.* at 9-10). Plaintiff alleges several officers used excessive force
 9 in arresting him, threatened Plaintiff while transporting him, and obtained a warrant with false
 10 information. (*Id.*). Plaintiff's allegations contain enough information to support claims for excessive
 11 force and false arrest at this stage in the litigation. *See Fontana v. Haskin*, 262 F.3d 871, 878-79 (9th Cir.
 12 2001) (describing factors that would make a seizure unreasonable under the Fourth Amendment); *Borunda*
 13 *v. Richmond*, 885 F.2d 1384, 1391 (9th Cir.1988) ("[A]n arrest without probable cause violates the Fourth
 14 Amendment and gives rise to a claim for damages under § 1983"). Therefore, Count 1 should be allowed
 15 to proceed.

16 Count 2 is brought against Defendants Bonner, M. Gove, G. Hodder, and Diaz. (ECF No. 104 at
 17 11). Plaintiff alleges that Bonner and Gove made comments about Plaintiff while in custody, resulting in
 18 "stares and comments from other inmates." (*Id.*). Plaintiff also alleges that Hodder wrongfully took away
 19 Plaintiff's free time and Diaz used excessive force against Plaintiff. (*Id.*). The Court previously told
 20 Plaintiff that without any allegation that Plaintiff was harmed as a result of Defendants' comments,
 21 Plaintiff has failed to state a claim. *Willard v. California Dept. of Corrections and Rehabilitation*, No.
 22 1:14-cv-760-BAM, 2015 WL 1498706 at *6 (E.D.Cal. 2015). Mere "stares and comments" are not harm.
 23 However, read liberally, Plaintiff's allegations against Hodder and Diaz could support due process and

24
 25 ¹ The Court is construing Plaintiff's allegations to be against currently unknown members of the Las Vegas Metropolitan Police
 Department rather than the department as a whole.

1 cruel and unusual punishment claims. *See Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (holding that
 2 inmates cannot be deprived of life, liberty, or property without due process); *Hudson v. McMillian*, 503
 3 U.S. 1, 4 (1992) (discussing the use of excessive physical force against a prisoner). Therefore, Bonner
 4 and Gove should be dismissed from the complaint with prejudice and Count 2 should be allowed to
 5 proceed as to Hoder and Diaz.

6 Count 3 is brought against Defendants Diaz and J. Nash. (ECF No. 104 at 12). Plaintiff alleges
 7 that Diaz took some of Plaintiff's documents and Nash denied Plaintiff's grievance regarding Diaz's
 8 conduct. (*Id.*). It is possible that intentional destruction of an inmate's property could violate the inmate's
 9 due process rights if the facility does not provide an adequate post-deprivation remedy. *Hudson v. Palmer*,
 10 468 U.S. 517, 536 (1984). Read liberally, Plaintiff's allegations against Diaz and Nash could support a
 11 due process claim. Therefore, Count 3 should be allowed to proceed.

12 Count 4 is brought against Defendants Jacque Graham and Nash. (ECF No. 104 at 22-23).
 13 Plaintiff alleges Graham violated Plaintiff's right to access the Courts by lying in a declaration and Nash
 14 made comments about Plaintiff being "crazy." (*Id.* at 22-23). The allegation against Graham has no
 15 details regarding what declaration he made or how he lied. Once again, Plaintiff fails to allege that he
 16 suffered any harm due to Nash's comments. Therefore, Count 4 should be dismissed with prejudice.

17 Count 5 is brought against Defendants Graham, Brian Williams, Nash, J. Gentry, and James
 18 Dzurenda. (*Id.* at 19-21). Plaintiff alleges that Gentry "left Plaintiff no administrative remedy" regarding
 19 an incident of missing documents. (*Id.* at 20). Plaintiff also alleges Graham, Williams, Nash, and
 20 Dzurenda violated his right to access the Courts by denying him legal supplies and lying to the Court
 21 about returning documents. (*Id.* at 21). Prisons "are required to provide a reasonable supply of paper and
 22 envelopes for the indigent inmates so as to permit them access to the courts." *Morgan v. Nevada Bd. of*
 23 *State Prison Comm'r's*, 593 F. Supp. 621, 624 (D. Nev. 1984). Read liberally, Plaintiff's allegations could
 24 support an access to the courts claim. Therefore, Count 5 should be allowed to proceed.

1 Count 6 is brought against Defendants Gentry and Beatrice Williams. (ECF No. 104 at 17-18).
2 Plaintiff alleges these Defendants falsely wrote Plaintiff up while in prison, wrongfully searched his mail,
3 and caused his objections to be untimely filed with the Court. (*Id.*). Read liberally, Plaintiff's allegations
4 could support a due process claim. Therefore, Count 6 should be allowed to proceed.

5 Counts 7 and 8 are brought against Defendants Gentry, Barrett, Kristopher Ledingham, Timothy
6 Filson, Mike Byrne, Tasheena Sandoval, and Dzurenda. (*Id.* at 13-16). Plaintiff alleges he was subjected
7 to unfair disciplinary hearings resulting in his being placed in disciplinary segregation and transferred to
8 another facility. (*Id.*). “[A] prisoner possesses a liberty interest under the federal constitution when a
9 change occurs in confinement that imposes an ‘atypical and significant hardship ... in relation to the
10 ordinary incidents of prison life.’” *Resnick v. Hayes*, 213 F.3d 443, 448 (9th Cir. 2000) (quoting *Sandin*
11 v. *Conner*, 515 U.S. 472, 484 (1995)). Read liberally, Plaintiff's allegations could support a due process
12 claim. Therefore, Counts 7 and 8 should be allowed to proceed.

13 Count 9 is brought against Defendants Filson, Byrne, Sandoval, P. Hernandez, and Dzurenda.
14 (ECF No. 104 at 32-33). Plaintiff alleges the Defendants have kept Plaintiff in prison past his mandatory
15 parole date. (*Id.* at 32). “[A] person who is in state custody may not use § 1983 to challenge ‘the very
16 fact or duration of ... confinement’ by seeking ‘a determination that he is entitled to immediate release or
17 a speedier release from that imprisonment.’” *Thornton v. Brown*, 757 F.3d 834, 841 (9th Cir. 2013).
18 Therefore, Count 9 should be dismissed with prejudice. As Count 9 is the only count to mention Defendant
19 Hernandez, Hernandez should be dismissed from the case with prejudice.

20 Accordingly, and for good cause shown,

21 IT IS HEREBY RECOMMENDED that Defendants I. Fouquet, “D,” the State of Nevada, Bonner,
22 M. Gove, and P. Hernandez be dismissed from the case with prejudice.

23 IT IS FURTHER RECOMMENDED that Counts 4 and 9 of the First Amendment Complaint (ECF
24 No. 104) be DISMISSED WITH PREJUDICE.

1 IT IS FURTHER RECOMMENDED that the First Amended Complaint (ECF No. 104) be allowed
2 to proceed on Counts 1, 2 (as to G. Hoder and Diaz), 3, 5, 6, 7, and 8.

3 IT IS FURTHER RECOMMENDED that the Clerk of Court issue summons to the remaining
4 Defendants so Plaintiff's remaining claims may proceed.

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6 **NOTICE**

7 Under Local Rule IB 3-2, any objection to this Report and Recommendation must be in writing
8 and filed with the Clerk of the Court within 14 days. The Supreme Court has held that the courts of appeal
9 may determine that an appeal has been waived due to the failure to file objections within the specified
10 time. (See *Thomas v. Arn*, 474 U.S. 140, 142 (1985)). This circuit has also held that (1) failure to file
11 objections within the specified time and (2) failure to properly address and brief the objectionable issues
12 waives the right to appeal the District Court's order and/or appeal factual issues from the order of the
13 District Court. (See *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United*
14 *Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983)).

15 Pursuant to LSR 2-2, the Plaintiffs must immediately file written notification with the court of any
16 change of address. The notification must include proof of service upon each opposing party or the party's
17 attorney. Failure to comply with this Rule may result in dismissal of the action. (See LSR 2-2).

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19 DATED this 22nd day of January, 2019.

20 
21 CAM FERENBACH
22 UNITED STATES MAGISTRATE JUDGE
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